

# SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1943

No. 366

THE UNITED STATES OF AMERICA, PETITIONER

vs.

JASPER WHITE

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES  
CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT.

## INDEX

	Original	Print
Record from D. C. U. S., Middle District of Pennsylvania	1	1
Grand jury presentment	1	1
Exhibit A—Testimony of Jasper White before Federal Grand Jury, Jan. 11, 1943	3	2
Exhibit B—Subpoena duces tecum and return thereon	8	4
Judgment and commitment	11	6
Minutes of proceedings	13	7
Caption and appearances	13	7
Colloquy between Court and counsel	21	7
Decision of the Court	22	8
Assignment of error	33	15
Docket entries	35	16
Notice of appeal	38	17
Grounds of appeal	39	18
Proceedings in U. S. C. C. A., Third Circuit	43	19
Minute entry of hearing	43	19
Opinion, Goodrich, J.	44	20
Dissenting opinion, Biggs, J.	48	22
Judgment	53	26
Petition for rehearing	55	26
Order denying petition for rehearing	64	31
Clerk's certificate [omitted in printing]	65	31
Order allowing certiorari		32

In the District Court of the United States for the  
Middle District of Pennsylvania

December Term, 1942

No. 10790—Dec. Term, 1942

IN RE LOCAL NO. 542, INTERNATIONAL UNION OF OPERATING ENGINEERS AND JASPER WHITE, ASSISTANT SUPERVISOR THEREOF, A  
WITNESS BEFORE THE GRAND JURY

*Presentment*

Filed Jan. 13, 1943

Come now the Grand Jurors for the United States of America, duly empaneled and sworn in the District Court of the United States for the Middle District of Pennsylvania at the December 1942 Term of said Court, and upon their oaths present and charge:

That on the 28th day of December 1942, the Honorable Judge Albert Watson did issue a subpoena duces tecum to Local No. 542, International Union of Operating Engineers, 201 North Broad Street, Philadelphia, Pennsylvania, calling for the production of certain books and records as specified in said subpoena, that said subpoena duces tecum was served on Local No. 542, International Union of Operating Engineers by Charles Schack, Deputy United States Marshal at Philadelphia, Pennsylvania, by handing a true copy thereof to the President of said Local No. 542 and making the contents of the said subpoena known to the president on December 30, 1942; that on January 11, 1942, one Jasper White did appear before the Grand Jury and did represent that he appeared pursuant to the aforesaid subpoena and on behalf of said Local No. 542 and that he was assistant supervisor for said Local

No. 542 and had the books and records called for by the aforesaid subpoena duces tecum in his possession; that

the said Jasper White did refuse to turn over said books and records of the Grand Jury; that the conduct and attitude of said Jasper White was such as to hinder, prevent, and delay the inquiry of the Grand Jury and to obstruct the due process of the Federal Court and the administration of justice in disregard of the court's order, as will more fully appear from a transcript of his testimony before said Grand Jury, which is herewith attached, made a part hereof, and marked "Exhibit A." A copy of the aforesaid subpoena issued to Local No. 542 is attached hereto as "Exhibit B."

Wherefore, the Grand Jurors present said Jasper White to this Honorable Court as a contemptuous witness, and respectfully request that he be dealt with accordingly.

(S) ADAM W. MATAN,  
Foreman.

Dated at Harrisburg, Pennsylvania, this 13th day of January A. D. 1943.

3

*Exhibit A to presentment*

#### TESTIMONY OF JASPER WHITE

Given before the Federal Grand Jury, January 11, 1943, at Harrisburg, Pennsylvania

4

JASPER WHITE, having been duly sworn according to law, was examined as follows:

By Mr. DOBEY:

Q. Mr. White, we have issued a subpoena duces tecum to Local Union No. 542, International Union of Operating Engineers; are you a representative of that organization?

A. I am.

Q. What is your position?

A. Assistant Supervisor.

Q. Is that equivalent to assistant or business agent?

A. It would be Business Manager.

Q. Assistant Business Manager?

A. That is correct.

Q. And the subpoena we have issued to the Union calls for the production of certain documents; do you have those documents with you?

A. I have a statement here.

Q. Would you mind answering my question whether you have the documents with you?

A. I have. I am the Assistant Supervisor of Local Union 542, International Union of Operating Engineers. On December 30, 1942 a subpoena duces tecum was served on M. F. Morgan, President of Local Union 542. This subpoena was directed to Local

Union 542 and I now have that subpoena with me and am here pursuant thereto. I have brought with me the requested papers, documents, and writings. Upon advice from counsel, whom I have consulted on behalf of Local Union 542, International Union of Operating Engineers, and on behalf of myself, in my capacity as an Assistant Supervisor thereof, and individually, and in view of the opinion of said counsel that great

5

uncertainty exists today as to what may or may not constitute a violation of Section 276 (b), Title 40, of the United States Code. I refuse to produce the documents referred to in said subpoena upon the ground that they may tend to incriminate Local Union 542, International Union of Operating Engineers, myself as an officer thereof, or individually. I therefore, claim on behalf of Local Union 542, its officers and members, and on my own behalf, the immunity granted under the Fourth and Fifth Amendments of the Constitution of the United States.

Q. As I understand your position, Mr. White, even if we assured you that the Union itself would not be a defendant, you would still claim immunity?

A. Would you repeat the question?

Q. My question is even though we assured you that the Union itself will not be a defendant—the Union Organization—nevertheless, you would still refuse to produce the records?

A. I would have to let my counsel answer that question.

(Witness withdraws from jury room to consult with counsel.)

(Witness returns to jury room.)

WITNESS. What is your question?

(Question read as follows: My question is even though we assured you that the Union itself will not be a defendant, the Union Organization, nevertheless you would still refuse to produce the records?)

6 Q. Your answer would still be no?

A. Yes; upon advice from counsel.

Q. You have the records with you?

A. Yes.

Q. Mr. White, we will have to ask you to come back on Wednesday afternoon at 3:00 o'clock. The Court is not here at the present time, otherwise we would check the matter up immediately, but unfortunately we cannot do that and the Court will be here on Wednesday afternoon. We will have to ask you to come back at that time.

A. All right.

Mr. CLARK. Could he come back?

WITNESS. I will come back.

Mr. DOREY. What we will do, we will draw up an order for the approval of the jury, to be presented to the Court, and then the Court will enter its decision on it, and we have no doubt that the decision will be that the records must be submitted.

7 I hereby certify that the testimony of Jasper White is contained fully and accurately in the notes taken by me and that the above copy is correct transcription of the same.

(S) JOHN RUTH,  
Court Reporter.

*Exhibit B to presentment*

District Court of the United States of America

No. —

THE UNITED STATES

vs.

GRAND JURY

The President of the United States of America

To LOCAL #542, INTERNATIONAL UNION OF OPERATING ENGINEERS,  
 201 North Broad Street, Philadelphia, Pennsylvania.

You are hereby commanded to appear in the District Court of the United States for the Middle District of Pennsylvania, at the Courthouse, in the city of Harrisburg, in said District, on the eleventh day of January, A. D. 1943, at 2.00 o'clock P. M. of said day, and also that you bring with you and produce at the time and place aforesaid—

1. Copy of constitution of Local #542, International Union of Operating Engineers.

2. Copy of bylaws of Local #542, International Union of Operating Engineers.

3. All books and records showing the receipt and disposition of work permit fees collected from January 1, 1942, to date.

4. All books and records showing the names of the persons who have collected work permit fees on behalf of Local #542, International Union of Operating Engineers, the amount collected by each such person, and from whom collected, for the period January 1, 1942, to date.

5. All applications for membership in Local #542, International Union of Operating Engineers, made during the period January 1, 1942, to date.

6. All records showing the action taken by Local #542, International Union of Operating Engineers on all the applications for membership in said Union referred to in Paragraph 5 of this subpoena.

7. Copies of all temporary permits issued by Local #542, International Union of Operating Engineers during the period January 1, 1942, to date.

8. Permit books for the period January 1, 1942, to date.

9. All interoffice memoranda of Local #542, International Union of Operating Engineers, in any way pertaining to the collection of work permit fees during the period January 1, 1942, to date.

10. All correspondence passing between Local #542, International Union of Operating Engineers, its officers, agents, and employees, and the International Union of Operating Engineers, its officers, agents, and employees in any way pertaining to work permit fees during the period January 1, 1942, to date.

11. All minutes of Local #542, International Union of Operating Engineers and all minutes of committees and boards thereof for the period January 1, 1942, to date.

Then and there to testify on behalf of the United States, and not depart the court without leave thereof or of the District Attorney.

Hereof fail not under penalty of what may befall you thereon.

Witness, the Honorable ALBERT WATSON, District Judge of the United States, this 28th day of December, A. D. 1942, and in the 166th year of the Independence of the United States of America.

(S) W. H. MITCHELL, *Clerk.*

(S) FREDERICK V. FOLLMER, *U. S. Attorney.*

UNITED STATES MARSHAL RETURN

THE UNITED STATES OF AMERICA

### GRAND JURY

Received this writ at Philadelphia, Pa., on December 30, 1942 and on Dec. 30, 1942, at Philadelphia, Pa., in my district, I served it on the within-named Local #542, International Union of Operating Engineers, located at 291 North Broad St., Philadelphia, Pa., by handing a true and attested copy thereof to John Mooney, President of the said Union, and making contents of the same known to him.

So answers—

JOSEPH C. REINS, *U. S. Marshal.*

By (S) CHAS. SCHACK, *Deputy.*

### MARSHAL'S FEES

Travel	-----	\$0.18
Service	-----	.50
		<hr/>
		.68

### ORDER

And now, to wit, January 13, 1943, the Clerk of this Court is directed to file the within Grand Jury Presentment in the Crim-

inal Docket under the caption: "United States vs. Jasper White," docketing the same in the usual manner.

(S) ALBERT W. JOHNSON,  
*United States District Judge.*

Approved as to form:

(S) FREDERICK V. FOLLMER,  
*U. S. Attorney.*

[No. 10790 C. D., Dec. Term, 1942. In the District Court of the United States, for the Middle District of Pennsylvania. United States of America vs. Jasper White. Grand Jury Presentment re Refusal of Jasper White to Produce the Books and Records of Local No. 542 International Union of Operating Engineers, etc.]

[File endorsement omitted.]

11 District Court of the United States, Middle District  
of Pennsylvania

No. 10790

UNITED STATES

v.

JASPER WHITE

Criminal Grand Jury Presentment re refusal to produce books and records, etc. Contempt in One count for Violation of U. S. C.

*Judgment and commitment*

Filed Jan. 14, 1943

On this 14th day of January 1943, came the United States Attorney, and the defendant Jasper White, appearing in proper person, and by counsel, Robert Fitzsimmons, Esq., 654 Madison Avenue, New York, N. Y. and,

The defendant having been convicted on verdict of the court of the offense charged in the presentment in the above-entitled cause, to wit: Contempt in re Refusal to produce the books and records of Local No. 542 International Union of Operating Engineers, etc., before the grand jury, and the defendant having been now asked whether he has anything to say why judgment should not be pronounced against him, and no sufficient cause to the contrary being shown or appearing to the Court, it is by the Court

Ordered and adjudged that the defendant, having been found



guilty of said offenses, is hereby committed to the custody of the Attorney General or his authorized representative for imprisonment for the period of Thirty (30) days.

It is further ordered that the Clerk deliver a certified copy of this judgment and commitment to the United States Marshal or other qualified officer and that the same shall serve as the commitment herein.

(Signed) ALBERT W. JOHNSON,  
*United States District Judge.*

The Court recommends commitment to Dauphin County Jail.  
A True Copy. Certified this 20th day of January 1943.

(Signed) W. H. MITCHELL,  
*Clerk.*

[SEAL] (By) H. F. KAUFMAN,  
*Deputy Clerk.*

12 Remarks: The testimony in this case was taken by court reporter and same will be transcribed and filed in the case No. 10790 C.D., United States v. Jasper White.

13 In the District Court of the United States in and for the Middle District of Pennsylvania

No. 10790 C.D.

UNITED STATES OF AMERICA

vs.

JASPER WHITE

*Minutes of Proceedings*

Filed Jan. 19, 1943

Before Hon. ALBERT W. JOHNSON, United States District Judge at Harrisburg, Pennsylvania, January 14, 1943.

*Appearances*

Allen A. Dohy, Esq., Special Assistant to the Attorney General, for the United States; Edward R. Kenney, Esq., Special Assistant to the Attorney General, for the United States; Frederick V. Follmer, Esq., United States Attorney; Herman F. Reich, Esq., Assistant United States Attorney; Robert J. Fitzsimmons, Esq., 654 Madison Avenue, New York, N. Y., for the defendant.

21 By the COURT. Now, Mr. Dohy, what specifically are you asking for now of this court?



By Mr. DOBEY. Your Honor, I would like to ask the court at this time to order the representative of the Union to deliver the records of the Union.

By the COURT. What is his name?

By Mr. DOBEY. Jasper White. To deliver the records into the custody of the Grand Jury and to appear before the Grand Jury and testify concerning those records.

By the COURT. And he has been subpoenaed by a duces tecum to bring these said records before this said Grand Jury?

By Mr. DOBEY. Yes; and he appeared before the Grand Jury and stated he had the records with him but that he refused to turn them over to the Grand Jury on the advice of counsel.

22

*Decision*

By the COURT. After hearing your arguments here and examining some of the authorities cited, the Court orders Jasper White, who has been before the Grand Jury under a subpoena duces tecum and who has refused to produce the books and papers of this local Union—now in support of this—

By Mr. DOBEY. Pardon me, may I interrupt at this moment? I think the record should show that Jasper White is present at court at the present time and has the records with him.

By Mr. FITZSIMMONS. That is correct.

By the COURT. So I understand. Now, in support of this order against Mr. Jasper White to produce these records—the Court will state that this Union whose books the witness Jasper White has here in court in his possession and which he has been ordered to produce before the Grand Jury, is a legal entity. It is more than a partnership, but for the purpose here it is one single person or entity which, as we all know, has much more power and authority than an ordinary partnership. The death of a member does not end the Union. It still goes on with great powers that have become sanctioned and permitted by the Government and is allowed in our public and national affairs to act as an entity in many of the most vital questions and matters and business of our national life; and having all those powers—all those privileges and all that protection, this Union owes duties to the Government, to the Nation, and among those duties one important one is to assist in the proper investigation and prosecution of acts against—of any acts that may be against the laws of the Nation where this entity, this Union, has a peculiar special knowledge and information probably without which the Government cannot prosecute violations of the law. Now, there are a number of cases that have been cited—four cases at least here in

23

support of the position the court has just taken, and no law or decision (and I hold there is a difference between law and decisions. Decisions are the evidence of the law) but the court gives great weight—all courts should give great weight to decisions as being in many or most cases the best evidence of what the law is). No authority has been cited against the position taken by the Government here and already supported by this court. No decisions or authorities have been cited against that position, but all the authorities and decisions referred to or found apparently favor the position of the Government and the position already taken by the court; and among those decisions we have here United States against Greater New York Life Poultry Chamber of Commerce in 34 Federal Reporter—Second series, starting on page 967, and I read with approval what is stated on page 968 by Judge Kennedy as follows (and this is a parallel case it appears. It is a case in point):

"In the first place the evidence discloses that the inquiry made by the district attorney and representative of the government in charge of the grand jury investigation involved the question concerning the books and records of Local 167, of which the defendant was an officer and secretary-treasurer at the time he appeared before the grand jury, and that his appearance there was in response to a subpoena duces tecum to present the books and records of that association concerning which his failure so to do, or in such full measure as the circumstances would seem to demand, the defendant was interrogated. This it would seem was a duty imposed upon the defendant which he could not evade under the rule in *Heike v. United States*, 227 U. S. 131, 33 U. Ct. 228, 57 L. Ed. 450, and other cases. Neither do I believe that because the same subpoena was of a personal nature to the defendant should exempt him from giving testimony concerning the books, papers, and documents of the association of which he was an official."

Now we have—this proposition is also—the position of the Court is also supported by the decision in the case of the United States against B. Goedde & Co., 40 Fed. Supp., starting on page 534, from the opinion of Lindley, District Judge, as follows:

24 "However, it is further apparent that inasmuch as the voluntary associations are subject to indictment, as has been pointed out, and constitute, in view of the law, separate legal entities, the pleas are bad on their face as to any immunity claimed for the voluntary associations. Nor can the contention that immunity extends to each and every member of the association, so far as the association's documents are concerned, have

any force. Obviously, any witness may assert and maintain his constitutional right to refuse to incriminate himself. But the papers of the association are in no wise the papers of each of the members. They belong to the separate entity, the association, which is itself indicted and which, under the statute, is not immune from production of testimony. No immunity can be claimed by any individual because of the contents of documents of a third person, including an association. Furthermore the individual officials have no right to complain if they produce papers of the association which they hold not in their private capacity but as officials of the separate legal entities. Then, too, the pleas do not disclose any defendant's testimony which tends to incriminate him. The production of the documents was a duty imposed upon defendants."

Then there's a long line of cases cited. So, in view of the law, as we find it, the court has but one duty to perform, and that is to order this witness, Jasper White, to produce the papers and documents of Local Union No. 542, which he has been subpoenaed to produce, he having been before the Grand Jury right now in session, and he being here in court with those said papers and documents. And you may prepare, if you wish, the proper written order, and the witness will, if you want him brought before the court—

By Mr. DOBEY. I think, your Honor, he should come to the Bar and be ordered orally by Your Honor to deliver those records at the present time.

Jasper White appeared before the Bar.

By the COURT. You have been subpoenaed, Mr. White, to produce these papers and documents of Local No. 542 of the International Union of Operating Engineers of 201 North Broad Street, Philadelphia, Pennsylvania. You have those papers with you?

25 By Mr. WHITE. Yes, I have.

By the COURT. Now the Court orders you to produce those before the Grand Jury now sitting in the particular case in which you are subpoenaed to appear.

By Mr. FITZSIMMONS. I want this to be construed in the record as Mr. White's words—

Mr. Mr. DOBEY. I think it would be proper for the court to ask whether he would now produce the records.

By the COURT. Yes. I think it is for the witness. You may give him the advice but it is for the witness to answer.

By Mr. WHITE. I respectfully decline.

By Mr. FITZSIMMONS. Record these as Mr. White's reasons for respectfully declining:

“Upon advice of counsel whom I have consulted on behalf of Local No. 542 of the International Union of Operating Engineers and on behalf of myself in my capacity as Assistant Supervisor thereof and individually, and in view of the opinion of said counsel that great uncertainty exists today as to what may or may not constitute a violation of Sections 385 and 423 of Title 28 of the United States Code, I refuse to produce the books or documents referred to in said subpoena, upon the ground that they may tend to incriminate Local No. 542 of the International Union of Operating Engineers and myself as an officer thereof and/or individually. I therefore claim on behalf of Local No. 542, its officers and members, and on my own behalf, the immunity granted under the Fourth and Fifth Amendment of the Constitution of the United States.”

By Mr. DOBEY. Your Honor, we suggest that the Court should hold Mr. White in contempt of court and sentence him accordingly.

By the COURT. I want to ask just one thing. He claims here these books would incriminate himself. Does that change the situation here?

By Mr. DOBEY. No. I think it is clear from the decisions that he cannot claim immunity so far as the production of the records of a third party are concerned.

By the COURT. You ask now that he be found guilty of contempt of court and then that the court take the proper action. Well, I am obliged under the law and the facts here to find Mr. Jasper White guilty of contempt of court. Now, the question is as to the punishment.

By Mr. DOBEY. Your Honor, I would like to say this—The Grand Jury is currently in session. The records were needed at this session and of course we are deprived of those records. It is going to be necessary to call the Grand Jury back after we get the records. We feel the utmost urgency exists in obtaining these records immediately. We therefore suggest that counsel for Mr. White and ourselves jointly contact the Clerk of Court today in Philadelphia and endeavor to expedite this appeal and procure an immediate hearing on this appeal. We recommend that the

27 court stay execution of its sentence for a period of five days pending perfection of the appeal on behalf of the defendant, and that upon the perfection of that appeal the court then take into consideration what further period the execution of sentence should be delayed pending the prompt prosecution of that appeal.

By Mr. FITZSIMMONS. Let me answer that and say that it is my intention to waste no time in perfecting this appeal. I think Mr. Dobey will find, after this experience with me, that my word counts for something. Five days is insufficient. I need ten days.

Saturday and Sunday might be included in the five day period—so give me ten days.

By the COURT. I think we will have no trouble about this procedure. I have your ideas and think we can work out a satisfactory arrangement so as to protect both parties. Now I want to consider the sentence now. If the court is right and your position is untenable, as I think it is—as I feel quite sure it is—then this action is an important matter—a serious matter. Now, I will have to pronounce sentence for this contempt of court. Now, what has been the sentence of the court in these other cases, if you have discovered that.

By Mr. FITZSIMMONS. Anywhere from thirty days to six months. The effect of the sentence is usually (in 99 cases out of 100) that the books then came forward. Immediately in the Goëdde case they were produced. As far as your sentence is concerned, it will become academic after it is passed on by the Circuit Court or the Supreme Court.

By the COURT. What would you say as to the time if a jail sentence is imposed?

28 By Mr. DOBEY. I think thirty days.

By the COURT. That is the sentence of the court—that Mr. Jasper White undergo imprisonment in the Dauphin County Jail for a period of thirty days as a punishment for this contempt in refusing to produce the records of this Local No. 542 of the International Union of Operating Engineers, 201 North Broad Street, Philadelphia, Pa. Now, the next question to determine is the length of time that will be allowed to perfect this appeal to our Circuit Court of Appeals of the Third Circuit, if the court is to consider a suspension of the service of this sentence. In other words, if we will suspend the service long enough to have an appeal taken and concluded, what shall be the time for taking out the appeal? Mr. Dobey says five days; you say ten days.

By Mr. FITZSIMMONS. About perfecting the appeal, I would want a little more time. It is a nice question and I have to bring it properly. I have to get the record. I say five days to file my notice of appeal and thirty days to perfect my appeal.

By Mr. DOBEY. That thirty-day period seems a little out of line. The record here can be transcribed today.

By the COURT. It is documentary and can be quickly done.

By Mr. DOBEY. We suggest seven days within which to file his notice of appeal and the period of ten days in which to file the record.

By Mr. FITZSIMMONS. That is alright.

29 By the COURT. Ten days in addition to five. Five days to complete the notice of appeal; seven more days to complete the record—that is what you say. Of course you both can

impress properly on the Circuit Court the importance of this so as to get an early decision.

By Mr. DOBEY. I think it is the type of matter in which the Circuit Court would give us a preference.

By the COURT. Are you satisfied with five and seven—five days for notice and seven more days to perfect the appeal.

By Mr. FITZSIMMONS. Seven more days to file my record and an additional few days to file my brief.

By the COURT. That will be for the Circuit Court. I am going to give you five days to complete your Notice of Appeal and I am going to give you ten more days to perfect your appeal by proper filing of the records. I think that will be ample. In the meantime, I will suspend the execution of this jail sentence—it ought to be until we have our decision. If these terms are met, I will suspend sentence of the execution of the jail sentence of thirty days in the Dauphin County Jail until we have a decision from the Circuit Court of Appeals.

By Mr. FITZSIMMONS. Say five days after the handing down of the decision by the Circuit Court of Appeals. I am entitled to a copy of it and if I want to go further.

30 By the COURT. Five days in addition, providing these records are furnished on call of the Grand Jury within five days from the decision of the Circuit Court of Appeals, provided the Court's order is sustained.

By Mr. DOBEY. Mr. Reich has raised a technical question on the matter of the record.

By Mr. REICH. I believe Your Honor said he would impose a sentence and suspend the execution. The Supreme Court has held that an indefinite suspension of sentence, without more, is void.

By the COURT. I understand. You cannot suspend execution without completing the sentence. The suspension is void. Suspension always requires probation. I will put the defendant on probation for the period of the suspension of the sentence.

By Mr. FITZSIMMONS. May I say I take exception.

By the COURT. Exception is allowed to the witness Jasper White.

By Mr. FITZSIMMONS. I think your Honor is aware that Local No. 542 realizes their responsibility to their country and want to do everything possible to cooperate. At the same time, especially in these days of changing decisions—Haddock v. Haddock, which has been followed for years, the other day suddenly changed. We have no rule and we feel it is necessary and important to get one, and that calls for our present attitude before you.

31 By the COURT. You have a right to take your appeal. That is the right citizens have in our Democracy. The



court has endeavored to give you a fair and full opportunity to take such appeal, during which time no harm will be done to you. In other words, you will be given a full and fair opportunity to test the order of the court in a higher tribunal. I hope they will be able to give you an early hearing. Mr. Dobey, what has been the procedure in these other cases? There has been no appeal in the others. I was wondering whether we should put the witness under bail for this period.

By Mr. REICH. If he is on production the courts have held that this is not a final judgment from which an appeal would lie. I stated to the court that a defendant is either sentenced definitely to a jail sentence, or if the sentence is imposed and suspended without more, the Supreme court has held that to be void; there is no sentence. The third is where a court imposed sentence, suspends execution and places on probation. In that case there can be no appeal while the probation is in effect. The only other alternative is to impose the sentence and then release on bail pending appeal.

By the COURT. I am inclined to think that will be right. We seem to agree on that. I will vacate that order of probation, and I will suspend sentence as I have stated and will put the witness, Mr. Jasper White, under bail for his appearance and production.

By Mr. DOBEY. I think Mr. Reich has in mind that you do not suspend sentence; that you impose sentence and that Mr. White be taken in custody by the Marshal and immediately you may approve his release on bail pending his appeal.

32 By the COURT. That procedure will be right. I have imposed the sentence, and Mr. White is now in the hands of the Marshal.

By Mr. FITZSIMMONS. May I now ask for bail in the nominal sum of one dollar?

By the COURT. I will grant the placing of Jasper White on bail.

By Mr. DOBEY. I suggest a personal bond of \$100.00.

By the COURT. That he sign a personal bond without surety in the amount of \$100.00. That is very fair, and that is what I will do. I will place him on his personal bond in the sum of \$100.00.

By Mr. FITZSIMMONS. May I ask you now and say to you as an officer of the court in other jurisdiction, under these circumstances, fingerprinting is dispensed with at this time.

By the COURT. I would like to see that avoided if it can be done legally, and for the present I state to the Marshal that he be not fingerprinted.



## 33 United States Circuit Court of Appeals, Third Circuit

UNITED STATES OF AMERICA

vs.

JASPER WHITE, DEFENDANT APPELLANT

*Assignments of error*

Filed Jan. 22, 1943

Now comes the defendant appellant Jasper White, by his attorney, Robert J. Fitzsimmons, Esq., and files the following as his assignment of errors herein and says that the judgment entered herein is erroneous and unjust for the following reasons:

1. The Court committed prejudicial and reversible error in adjudging the defendant in contempt of Court for failure to obey the order of the Court directing the production of the books and records of Local Union 542, International Union of Operating Engineers, before the Grand Jury, pursuant to a subpoena duces tecum served upon a officer of that organization.

2. The Court committed prejudicial and reversible error in ordering the production of the books and records of Local 542 International Union of Operating Engineers, an unincorporated association, called for in the subpoena duces tecum served upon a officer of the Union, and pursuant to which the defendant appeared before the Grand Jury and refused to turn over the said books.

3. The Court committed prejudicial and reversible error in denying to the defendant, as a representative of a voluntary unincorporated association, the immunity against the self incrimination of that organization, as provided under the Fifth Amendment of the Constitution of the United States.

4. The Court committed prejudicial and reversible error in ruling that a labor union, an unincorporated voluntary association, is not entitled to immunity from self incrimination, as provided by the Fifth Amendment of the United States Constitution.

5. The Court committed prejudicial and reversible error in ruling that the defendant, as an individual, was not entitled to immunity from self incrimination under the Fifth Amendment of the United States Constitution on the grounds that the questions asked of him and the testimony sought to be elicited from him before the Grand Jury, might reasonably tend to incriminate him in the commission of a crime against the United States.

6. The Court committed prejudicial and reversible error in overruling the defendant's contention that production of the

documents called for in the subpoena duces tecum would constitute an unreasonable search and seizure of the records of Local Union 542, International Union of Operating Engineers, in violation of its rights under the Fourth Amendment of the United States Constitution.

7. The Court committed prejudicial and reversible error in imposing sentence upon the defendant.

By reason of said error and other manifest errors appearing in the record, the defendant appellant Jasper White prays that the judgment of conviction be set aside and that he be discharged from custody.

Dated New York, N. Y., January 21, 1943.

ROBERT J. FITZSIMMONS,

*Attorney for Defendant Appellant,  
Office & P. O. Address, 654 Madison Avenue,  
Borough of Manhattan,  
City of New York.*

35

In United States District Court

Criminal Docket—Dec. Term, 1943—10790

u. THE UNITED STATES

vs.

JASPER WHITE

Attorneys for U. S.: Frederick V. Follmer, U. S. Attorney; Herman F. Reich, Asst. U. S. Attorney, Scranton, Pa.; Allen A. Doherty and Edward R. Kenney, Special Assistants to the Attorney General. For Defendant: Robert J. Fitzsimmons, 654 Madison Avenue, New York, N. Y.

#### CASH RECEIVED AND DISBURSED

Jan. 18, 1943.—Robert J. Fitzsimmons, \$5.00.

#### CONTEMPT PROCEEDINGS

Jan. 13, 1943.—Grand Jury Presentment Re Refusal of Jasper White to Produce the Books and Records of Local No. 542 International Union of Operating Engineers, etc. and Order directing clerk to file said grand jury presentment in the criminal docket under the caption: "United States vs. Jasper White," docketing same in the usual manner. (J.)

Jan. 14, 1943.—After hearing, Judge Johnson found defendant, Jasper White, guilty of contempt.

Jan. 14, 1943—Sentence: Imprisonment for the period of 30 days, Dauphin County Jail recommended. (J.) 2 cert. copies of Judgment & Commitment handed U. S. Marshal.

Jan. 14, 1943—Order directing clerk to accept personal bond of Jasper White conditioned that defendant shall be and personally appear before Mid. Dist. Court upon Mandate of Circuit Court of Appeals or any further order of this court. (J.)

Jan. 14, 1943—Cert. copy handed U. S. Marshal.

Jan. 14, 1943—Bail Bond in sum of \$100 without surety, for appearance before Middle District Court upon the Mandate of the Circuit Court of Appeals or any order of this Court, and order of approval thereon. (J.) (Order of Jan. 14 attached to Bond.) JS 2 & 3.

Jan. 18, 1943—Notice of Appeal and Grounds of Appeal.

Jan. 19, 1943—Copy of Notice of appeal and Clerk's Form of Notice as prescribed by Supreme Court General Orders, and letter giving names of counsel, etc. mailed to Clerk, Circuit Court of Appeals for 3rd Circuit at Phila.

Jan. 19, 1943—Letter notifying Judge Johnson, in accordance with Supreme Court Order No. VII, that notice of appeal was filed.

Jan. 19, 1943—Court Minutes of the Proceedings at Harrisburg, Pa. on Jan. 14, 1943.

Jan. 22, 1943—Assignment of errors.

Jan. 25, 1943—Certified copy of Record on Appeal mailed Clerk, Circuit Court of Appeals, for the Third Circuit, Philadelphia, Pa.

37 [Clerk's certificate to foregoing transcript omitted in printing.]

38 In District Court of the United States, Middle District of Pennsylvania

No. 10790—Dec. Term 1943

UNITED STATES OF AMERICA, APPELLEE

vs.

JASPER WHITE, APPELLANT

*Notice of appeal*

Name and address of Appellant: Jasper White, Ambler, Pennsylvania.

Name and address of Appellant's Attorney: Robert J. Fitzsimmons, 654 Madison Avenue, New York City, New York.

Offense: Violation of Title 28, Section 386, United States Code (Wilful Contempt of a District Court of the United States).

Date of Judgment: January 14, 1943.

Brief Description of Judgment or Sentence: Defendant Jasper White was sentenced to serve thirty (3) days in the Dauphin County Jail and admitted to bail in the sum of One hundred dollars (\$100) pending appeal.

I, the above-named Appellant, hereby appeal to the United States Circuit Court of Appeals for the Third Circuit, from the judgment above mentioned, on the grounds set forth below.

JASPER WHITE, *Appellant*.

Dated January 16th, 1943.

39 In District Court of the United States, Middle  
District of Pennsylvania

UNITED STATES OF AMERICA, APPELLEE

vs.

JASPER WHITE, APPELLANT

*Grounds of appeal*

1. The Court committed prejudicial and reversible error in adjudging the defendant in contempt of Court for failure to obey the order of the Court directing the production of the books and records of Local Union 542, International Union of Operating Engineers, before the Grand Jury, pursuant to a subpoena duces tecum served upon an officer of that organization.

2. The Court committed prejudicial and reversible error in ordering the production of the books and records of Local 542, International Union of Operating Engineers, and unincorporated association, called for in the subpoena duces tecum served upon an officer of the union, and pursuant to which the defendant appeared before the Grand Jury and refused to turn over the said books.

3. The Court committed prejudicial and reversible error in denying to the defendant, as a representative of a voluntary unincorporated association, the immunity against the self incrimination of that organization, as provided under the Fifth Amendment of the Constitution of the United States.

40 4. The Court committed prejudicial and reversible error in ruling that a labor union, an unincorporated voluntary association, is not entitled to immunity from self incrimination, as provided by the Fifth Amendment of the United States Constitution.

5. The Court committed prejudicial and reversible error in ruling that the defendant, as an individual, was not entitled to immunity from self incrimination under the Fifth Amendment of the United States Constitution on the grounds that the questions asked of him and the testimony sought to be elicited from him before the Grand Jury, might reasonably tend to incriminate him in the commission of a crime against the United States.

6. The Court committed prejudicial and reversible error in overruling the defendant's contention that production of the documents called for in the subpoena duces tecum would constitute an unreasonable search and seizure of the records of Local Union 542, International Union of Operating Engineers, in violation of its rights under the Fourth Amendment of the United States Constitution.

7. The Court committed prejudicial and reversible error in imposing sentence upon the defendant.

ROBERT J. FITZSIMMONS,  
*Attorney for Defendant.*

[Endorsements:] Notice of Appeal and Grounds of Appeal.  
Received & Filed Jan. 26, 1943. Wm. P. Rowland, Clerk.

41 [Clerk's certificate to foregoing papers omitted in printing.]

43 In the United States Circuit Court of Appeals for the Third  
Circuit

No. 8265—October Term, 1942

UNITED STATES OF AMERICA

vs.

JASPER WHITE, APPELLANT

*Minute entry of hearing*

And afterwards, to wit, the 15th day of February 1943, come the parties aforesaid by their counsel aforesaid, and this case being called for argument sur pleadings and briefs, before the Honorable John Biggs, Jr., Honorable Albert B. Maris, and Honorable Herbert F. Goodrich, Circuit Judges, and the Court not being fully advised in the premises, takes further time for the consideration thereof.

44 In the United States Circuit Court of Appeals for  
the Third Circuit

No. 8265—October Term, 1942

UNITED STATES OF AMERICA,

v.

JASPER WHITE, APPELLANT

On Appeal From the Judgment of the District Court of the United  
States for the Middle District of Pennsylvania

*Opinion*

(Filed May 24, 1943)

Before BIGGS, MARIS, and GOODRICH, Circuit Judges

GOODRICH, Circuit Judge.

The facts in the case at bar are not in dispute. On December 28, 1942, a subpoena duces tecum was issued by the District Court of the United States for the Middle District of Pennsylvania addressed to a labor union, "Local No. 542, International Union of Operating Engineers," requiring it to produce on January 11,

1943, certain books and records before a grand jury of the  
45 United States District Court for the Middle District of  
Pennsylvania sitting at Harrisburg. The books and records called for were books and records belonging to the union. On December 30, 1942, the subpoena was served on the president of the union.

The grand jury was engaged in an investigation of alleged irregularities occurring in connection with the construction of the Mechanicsburg Naval Supply Depot. On January 11, 1943, the defendant, Jasper White, an assistant supervisor or business manager of the union, came before the grand jury and stated that he appeared in response to the subpoena and that he had brought with him the books and records specified. He then read a statement which had been prepared for him by counsel and refused to turn over the books and records, claiming "... on behalf of Local Union 342, International Union of Operating Engineers, and on behalf of myself, in my capacity as an Assistant Supervisor thereof, and individually ..." the immunity guaranteed by the Fourth and Fifth Amendments to the Constitution of the United States.

<sup>1</sup> There were eleven items specified in the subpoena. The first item specified was a copy of the constitution of the Local. The last was its minutes. Certain of the items were obviously germane to the inquiry which the grand jury was conducting.

The judge assigned to preside in the District Court of the United States for the Middle District of Pennsylvania at Harrisburg was not available on January 11, 1943. The defendant was requested to return to the Federal Building on January 13, 1943, at which time the judge was expected to be present. On January 13, 1943, the grand jury filed a presentment charging the defendant with being a contumacious witness and requesting his banishment. On January 14, 1943, the judge held a hearing in respect to the presentment and heard the arguments of counsel. The defendant was in the courtroom and had the books and records with him. So far as the record shows, the District Judge did not examine the books and records called for by the subpoena. He delivered an oral opinion, proceeding on the theory that a labor union cannot avail itself of the privilege against self incrimination<sup>2</sup> and made it clear that if the defendant persisted in his refusal to produce the books and records before the grand jury he would be found guilty of contempt of court. The judge then called the defendant before the bar of the court and directed him to produce the books and records before the grand jury. The defendant again declined to produce the books and records and his counsel read a statement wherein the defendant claimed "... on behalf of Local No. 542, its officers and members, and on my own behalf, the immunity granted under the Fourth and Fifth Amendments of the Constitution of the United States."

The question before the Court is: Can the defendant refuse to produce the records of the union on the ground that they will incriminate him? It has been established law since the decision in *Boyd v. United States*, 136 U. S. 616 (1896), that the right of a witness to refuse to produce books and papers upon the ground that their production would incriminate him must be based upon the fact that the books and papers in respect to which the privilege is asserted are the witness's own books and papers. It is clear that the books and records here are not the private books and records of the defendant alone and that they do not in fact belong to him only. They are the books and records of the union. Nor has the defendant asserted any facts which would bring him by analogy within the rule stated by Wigmore in respect to officers of corporations, that "... for any documents therein [corporate records] that concern only the 'private or personal' affairs of the officer, the Court may direct their 'withdrawal from

<sup>1</sup> Citing *United States v. Greater New York Live Poultry Chamber of Commerce*, 54 F. (2d) 967, 968 (S. D. N. Y. 1929), aff'd 47 F. (2d) 156 (C. C. A. 2, 1931) (but without question not involved); cert. denied, 283 U. S. 837 (1931). <sup>2</sup> *United States v. R. Gaudin & Co.*, 40 F. Supp. 523, 534 (E. D. Ill. 1941). See also *United States v. Lumber Products Ass'n*, 42 F. Supp. 910 (S. D. Cal. 1942); *In re Local Union No. 550, United Brotherhood of Carpenters and Joiners of America*, 33 F. Supp. 544 (S. D. Cal. 1940).

<sup>3</sup> Wigmore on Evidence (3d Ed. Supp. 1941), § 2250.



scrutiny." citing *Wilson v. United States*, 221 U. S. 361 at 378 (1911).

47 However, that does not dispose of the case. We think that if the defendant was a member of the union he could avail himself of the privilege against self-incrimination if the documents tended to incriminate him. The appellee claims there is an analogy between corporations and labor unions. If this were so, neither the union nor White as its officer could claim the privilege. *Hale v. Henkel*, 201 U. S. 43 (1906); *Wilson v. United States*, 221 U. S. 361 (1911). However, we do not find the analogy persuasive. The reasons why a corporation cannot avail itself of the privilege are stated in *Wilson v. United States* and *Hale v. Henkel*, *supra*. A corporation is a creature of the state legislature, enjoying privileges and franchises subject to the laws of the state and limitations of its charter. When the state grants incorporation, it reserves a visitatorial power to exact compliance with these regulations. Implicit in this situation is the requirement that the corporation maintain books and records to reflect its transactions and that it yield these documents to inspection when its affairs are questioned by the state.

The present day status of Local 542 is quite different. It does not derive its existence from any charter granted by the state. Its books and records are not of a public or even semi-public character. They are the private documents of the union members who, had they so chosen, did not need to keep records in the first instance. There is nothing, in the absence of legislation, giving the state a reserved visitatorial power over the union and its affairs. For the purposes of the privilege against self-incrimination the members of the union are in the same position as ordinary individuals who maintain books and records of their transactions. We think if the defendant was a member of the union and the contents of the books and records subpoenaed would, upon examination by the trial judge, have tended to incriminate him, that his claim to privilege should have been allowed.

48 However, the record does not answer the basic question of whether White was a member of the union. It is stated that he was the business manager or assistant supervisor of the union. Whether to hold this position he had to be such a member the Court does not know. The view taken by the court below obviated the necessity for such an inquiry and neither White nor the government offered any evidence or testimony on this issue. Such evidence is in our view highly relevant. The case is, therefore, remanded to the District Court to determine whether White was a member of Local 542. If he was, then the books should be examined by the trial judge to determine whether they tend to incriminate White as an individual. See *Brown v.*

United States, 276 U. S. 134, 144-145 (1928). If they do, the claim of privilege should be sustained.

The judgment is reversed and the cause remanded for further proceedings in accordance with this opinion.

*Dissenting opinion*

BIGGS, *Circuit Judge* (dissenting):

I must record my dissent from the opinion expressed by the majority.

Two questions must be answered in the case at bar: (1) May the defendant refuse to produce the records of the union on the ground that they will incriminate him; and (2) May he refuse on the ground that their production by him will incriminate the union or its members?

The defendant read to the grand jury a statement prepared by his attorney which set out the facts on which he based his claim of privilege under the Fifth Amendment. After the presentment of the grand jury to the court but before the court sentenced the defendant, his attorney read a statement to the District Judge which again stated his client's grounds for claiming the privilege. These statements need not be repeated here. They are set out in the majority opinion.

49 At no time did the defendant assert or allege that he himself was a member of Local No. 542. He did not claim that the books and records of the union contained disclosures so related to his personal acts as to make them virtually his own.<sup>1</sup> He did not assert any facts which by analogy would bring him within the rule stated by Wignore in respect to officers of corporations.<sup>2</sup> The privilege against self-incrimination is personal. It may not be asserted by one individual on behalf of another.<sup>3</sup> No fact appears in the record before us from which the court below would have been justified in sustaining the claim of privilege. So far as the record shows the defendant is in the position

<sup>1</sup> It is contended that the District Judge should have inspected the books and records to see if their contents would tend to incriminate the defendant. This contention cannot be sustained. It was the defendant's duty to produce the books in order that the court might by an inspection of them satisfy itself whether they contained matters which might tend to incriminate. As was stated in *Brown v. United States*, 276 U. S. 134, 144, "If . . . [the witness] declined to . . . [produce the records covered by the subpoena], that alone would constitute a failure to show reasonable ground for his refusal to comply with the requirements of the subpoena." In the cited case Mr. Justice Sutherland quoted with approval the decision of the Court of Appeals of Kentucky in *Commonwealth v. Southern Express Co.*, 169 Ky. 1, 3, where it was said, ". . . the individual citizen may not resolve himself into a court and himself determine and assert the incriminating nature of the contents of books and papers required to be produced."

<sup>2</sup> "Nor can . . . [the witness] refuse to produce on the ground that some parts of the corporate records would incriminate himself even if such parts were made by himself; though, for any documents therein that concern only the 'private or personal' affairs of the officer, the Court may direct their withdrawal from scrutiny," citing *Hale v. Henkel*, 201 U. S. 90; *Wilson v. United States*, 221 U. S. 361; and other authorities. Wignore on Evidence, Third Edition, Volume 8, Section 2259b, 1943, Book 8 Supplement p. 23.

<sup>3</sup> Wignore, *supra*, Section 2196.

of any individual who has in his possession books and records belonging to others and is called upon to produce them before a grand jury. It is axiomatic that unless a witness claims some measure of ownership in records he is not entitled to claim the privilege in respect to them. The defendant may or may not be a member of Local No. 542 but his status in this respect is immaterial. He has chosen to stand on his carefully prepared written statements.<sup>4</sup> He has had his day in court and I think that he, the District Court, and ourselves are bound upon the record. It follows that the answers to the two questions set out in the second paragraph of this opinion must be in the negative.

If however, the defendant had asserted in the court below that he was a member of the union, I would still be of the opinion that the judgment of conviction should be affirmed. Labor unions are not partnerships.<sup>5</sup> A member of a partnership may maintain the privilege against self-incrimination in respect to the production of the records of the partnership. The right to choose one's fellow members, the *delectus personarum*, which is regarded as one of the most important and indispensable characteristics of a partnership,<sup>6</sup> is not available to the members of a labor union. Generally a worker may be admitted to a labor union without the consent of all of the members. See *People v. Herbert*, 295 N. Y. S. 251. And a member may not be expelled from the union so long as he meets its membership requirements. *Spayd v. Ringing Rock Lodge No. 665*, 270 Pa. 67, 113 A. 70; *Thompson v. Grand International Brotherhood of Locomotive Engineers*, 41 Tex. Civ. App. 176, 91 S. W. 834; *Abdon v. Wallace*, 95 Ind. App. 604, 165 N. E. 68; *Sweetman v. Barrows*, 263 Mass. 349, 161 N. E. 272. Unlike the members of a partnership, the members of a union do not act as agents for each other or assume responsibility for the conduct of the other members. Consequently in fact there can be no claim of personal ownership or privity by the members of a union in the records of the organization. The books and records of a labor union are no more the personal property of the individual members than are the funds in a union treasury the private and personal funds of the members.<sup>7</sup>

<sup>4</sup> Such statements allege only that he is an officer of the union. Since the constitution and bylaws of the union have not been produced, this court has no way of knowing whether or not an officer is *ipso facto* a member of the union.

<sup>5</sup> I agree with the majority that the analogy between corporations and labor unions is not persuasive. As the majority state, a power of visitation on the part of the state is included with the privileges granted by the charter and the immunity from personal liability which is one of these privileges.

<sup>6</sup> *Meehan, Elements of Partnership*, Sec. 5.

<sup>7</sup> It is interesting to observe that in at least two cases it has been held that if an officer of a union converts the funds of the union to his own use, he may be found guilty of larceny. See *People v. Herbert*, *supra*, and *People ex rel. Murphy v. Crane*, 80 N. Y. S. 408. It is true that in the cited cases the defendants asserted the supposed analogy between unions and partnerships and that the Supreme Court at New York in arriving at the conclusion which I have stated, had before it a statute, section

## SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1943

*Order allowing certiorari*

Filed November 8, 1943

The petition herein for a writ of certiorari to the United States Circuit Court of Appeals for the Third Circuit is granted.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

Labor unions are unincorporated associations composed of individuals, but they are also organizations which today operate as entities. Their members do not function as individuals in relation to the public. This fact has been recognized frequently by Congress.<sup>7</sup> The law should not extend to the records of such bodies, or to those of any other unincorporated association which functions as an entity, a privilege hitherto zealously restricted to an individual who claims the privilege expressly on his own behalf. If this conclusion is correct, membership in a union can confer no right upon an individual to claim the privilege guaranteed by the Fifth Amendment on the ground that the production of the books and records of the union will incriminate him or the organization.

It follows that even if it be assumed that the defendant is a member of Local 542, he cannot meet the test imposed by the Supreme Court in *Boyd v. United States*, 116 U. S. 616, 52 633. In the cited case Mr. Justice Bradley made use of the definitive phrase "a man's private books and papers." The Supreme Court held that the privilege against self-incrimination guaranteed by the Fifth Amendment was applicable only to a man's personal records. The *Boyd* case is the governing law today on this point. It is unrealistic to say that by reason of membership in the union, the defendant can meet the test laid down by the Supreme Court in the *Boyd* case.

Accordingly I conclude that the judgment of conviction should be affirmed.<sup>8</sup>

A true Copy:

Teste:

*Clerk of the United States Circuit Court of Appeals  
for the Third Circuit.*

<sup>7</sup> 528 of the Penal Code of New York of 1884, which provided that any person, who having property in his possession as an officer of any person, association, or corporation, appropriated it to his own use, could be found guilty of larceny. Nonetheless, the Court based its conclusion upon the fact that the defendants in the two cases cited were not possessed of such an interest in the moneys of their union as to enable them to plead ownership. See also *Starr v. Chase* [1924] 4 D. L. R. 55, [1924] S. C. R. 495—Can.

<sup>8</sup> For example, the right to collective bargaining has been established by law. See Sections 7-8 of the National Labor Relations Act, Act of July 5, 1935, c. 372, 49 Stat. 452, 29 U. S. A., §§ 157-158. Labor unions likewise are given a special status in respect to the antitrust laws of the United States. Section 20 of the Act of October 15, 1914, c. 323, Sec. 6 (The Clayton Act), 38 Stat. 731, 15 U. S. C. A. § 17. The Norris-La Guardia Act protects labor unions from injunctions for the purposes specified in the Act. See Section 4 of the Act of March 23, 1932, c. 90, 47 Stat. 70, 29 U. S. C. A. § 104.

In this connection see what Mr. Chief Justice Taft stated in the *First Coronado Case*, *United Mine Workers v. Coronado Coal Co.*, 259 U. S. 344 at p. 391.

<sup>9</sup> Compare the following four decisions of lower federal courts: *United States v. B. Goette & Co.*, 40 F. Supp. 523, 534; *United States v. Greater N. Y. L. P. Chamber of Commerce*, 34 F. Supp. 967, 968, affirmed 47 F. (2d) 156, cert. den. 283 U. S. 837; *United States v. Lumber Products Ass'n*, 42 F. Supp. 910; *In re Local Union No. 550, United Brotherhood of Carpenters and Joiners of America*, 33 F. Supp. 544.

53 In the United States Circuit Court of Appeals for the  
Third Circuit

No. 8265—October Term 1942

UNITED STATES OF AMERICA

*vs.*

JASPER WHITE, APPELLANT

*Judgment*

Filed May 24, 1943

Present: BIGGS, MARIS, and GOODRICH, Circuit Judges.

On appeal from the District Court of the United States for the Middle District of Pennsylvania.

This cause came on to be heard on the transcript of record from the District Court of the United States for the Middle District of Pennsylvania, and was argued by counsel.

On consideration whereof, it is now here ordered and adjudged by this Court that the judgment of the said District Court in this case be, and the same is hereby reversed, and the cause is remanded to the said District Court for further proceedings in accordance with the opinion of this court.

By the Court:

GOODRICH, Circuit Judge.

MAY 24, 1943.

55 In the United States Circuit Court of Appeals for the Third  
Circuit

October Term, 1942

No. 8265

UNITED STATES OF AMERICA, APPELLEE

*v.*

JASPER WHITE, APPELLANT

*Petition for Rehearing*

Filed June 7, 1943

Comes now the United States of America, the appellee in the above-entitled cause, and presents, this, its petition for a rehearing of the above-entitled cause and, in support thereof, respectfully shows the following:

I. The judgment of this Court in the above-entitled cause, rendered on May 24, 1943, reversed the decision of the District

Court of the United States for the Middle District of Pennsylvania sentencing the defendant, Jasper White, to thirty days in jail for criminal contempt.

56 II. The sole ground for this petition is to suggest that the Circuit Court lacked jurisdiction to hear the appeal of the defendant Jasper White. The question of jurisdiction was not raised or considered by the Circuit Court in hearing the defendant's appeal and reversing the judgment of the District Court.

III. The defendant's appeal in this case should have been taken by petition for allowance of appeal pursuant to section 8 (c) of the Act of February 13, 1925 (28 U. S. C. A., section 230). Instead of following this procedure the defendant gave notice of appeal under Rule 3 of the Rules of Practice and Procedure of the Supreme Court applicable to proceedings after plea of guilty, verdict of guilty, or finding of guilt by the court if a jury has been waived. These Rules were not applicable to the instant case, since in the instant case there was no plea of guilty, verdict of guilty, or finding of guilt by the court after waiver of a jury. In *Nye v. United States*, 313 U. S. 33, the Supreme Court expressly held that an appeal from a judgment for criminal contempt, such as was involved in the instant case, was governed by section 8 (c) of the act of February 13, 1925 (28 U. S. C. A., section 230). Under that section the defendant was required to apply to the District Court or the Circuit Court for the allowance of his appeal. In the absence of such an application and favorable action thereon, this court lacked jurisdiction to hear the defendant's appeal. *Alaska Packers Association v. Pillsbury*, 301 U. S. 174.

57 Wherefore, it is respectfully submitted that this petition for rehearing should be granted, that the Court should pass upon the question of its jurisdiction to hear the defendant's appeal, that the Court should dismiss the defendant's appeal for lack of jurisdiction, and that the Court should withdraw its opinion of May 24, 1943, in this case.

ALLEN A. DOBEY,

*Special Assistant to the Attorney General.*

TOM C. CLARK,

*Assistant Attorney General.*

FREDERICK V. FOLLMER,

*United States Attorney.*

CERTIFICATE

This petition for rehearing is presented in good faith and not for delay.

ALLEN A. DOBEY,

*Special Assistant to the Attorney General.*



## BRIEF IN SUPPORT OF PETITION

## I

AN APPEAL FROM A JUDGMENT OF CRIMINAL CONTEMPT IS GOVERNED BY SECTION 8 (C) OF THE ACT OF FEBRUARY 13, 1925 AND NOT BY THE RULES OF THE SUPREME COURT APPLICABLE TO PROCEEDINGS AFTER PLEA OF GUILTY, VERDICT, OR FINDING OF GUILT BY THE COURT WHERE A JURY IS WAIVED

By section 688 of Title 18, U. S. C. A., the Supreme Court is given the power to prescribe rules of practice and procedure "with respect to any or all proceedings after verdict, or finding of guilt by the court if a jury has been waived, or plea of guilty" in federal criminal cases. Pursuant to this statutory grant of authority the Supreme Court on May 7, 1934, promulgated Rules of Practice and Procedure "in all proceedings after plea of guilty, verdict of guilty by a jury, or finding of guilt by the trial court where a jury is waived" in federal criminal cases. Neither the statutory authority therefor nor the order of the Supreme Court promulgating the rules pursuant to the statutory authority extends to cases of criminal contempt where there has been no plea of guilty, verdict of guilt by a jury, or finding of guilt by the court where a jury has been waived. Consequently, Rule 3 of the Supreme Court's Rules of Practice and Procedure in proceedings after plea of guilty, verdict of guilty by a jury, or finding of guilt by the trial court where a jury is waived, which provides that an appeal may be taken by filing a notice of appeal within five days after the entry of judgment of conviction, was not applicable in the instant case.

59 In *Nye v. United States*, 313 U. S. 33 (at page 40) (decided April 14, 1941), the Supreme Court expressly held that appeals from judgments for criminal contempt where there is no plea of guilty, verdict of guilty by a jury, or finding of guilt by the court where a jury has been waived, should be taken by petition for allowance of appeal pursuant to the provisions of section 8 (c) of the Act of February 13, 1925, and not by notice of appeal under the Rules of the Supreme Court with respect to proceedings after plea of guilty, verdict of guilty by a jury, or finding of guilty by the court where a jury is waived.

Following the decision of the Supreme Court in the *Nye* case which was rendered on April 14, 1941, section 689, Title 18, U. S. C. A., was enacted on November 21, 1941, and provided that the

<sup>1</sup>The decision of the Supreme Court in the *Nye* case overruled *Wilson v. Tyson Jackson Co.*, 263 F. (2d) 577 (C. C. A. 9th), where the Circuit Court held that an appeal in a criminal contempt proceeding was properly taken by notice of appeal.

provisions of sections 687 and 688 of Title 18 were "hereby extended to proceedings to punish for criminal contempt of court." However, sections 687 and 688, Title 18, merely give the Supreme Court the power to prescribe Rules of Practice and Procedure in certain types of cases and the effect of the enactment of section 689 is simply to extend the Supreme Court's power to prescribe rules of practice and procedure to include the power to prescribe such rules with respect to proceedings to punish for criminal contempt. The Supreme Court, however, has not yet exercised

60 this grant of authority with respect to proceedings to punish for criminal contempt. The Supreme Court has not yet adopted any special rules of practice and procedure with respect to proceedings to punish for criminal contempt. Nor has the Supreme Court provided by order that the Rules of Practice and Procedure with respect to proceedings after plea of guilty, verdict of guilty by a jury, or finding of guilt by the court where a jury is waived, shall apply to proceedings to punish for criminal contempt. Hence until the Supreme Court expressly adopts special rules of practice with respect to proceedings to punish for criminal contempt or expressly adopts the Rules of Practice and Procedure already established with respect to proceedings after plea of guilty, verdict of guilty, or finding of guilt by the court where a jury has been waived, as applicable to proceedings to punish for criminal contempt, appeals in criminal contempt cases will continue to be governed by the provisions of section 8 (c) of the Act of February 13, 1925, and will require a petition for allowance of appeal.

There is nothing in the language of section 689 to indicate that Congress intended by statutory fiat to make the Rules of Practice and Procedure established by the Supreme Court with respect to proceedings after plea of guilty, verdict of guilty, or finding of guilt by the court where a jury has been waived, applicable also to proceedings to punish for criminal contempt.

61.

## II

IN THE ABSENCE OF A PETITION FOR ALLOWANCE OF APPEAL, AND THE GRANT OF SUCH PETITION BY THE DISTRICT COURT OR THE CIRCUIT COURT, THIS COURT LACKED JURISDICTION TO HEAR THE DEFENDANT'S APPEAL.

In the Nye case, *supra*, involving an appeal from a judgment of criminal contempt, where the defendant, as in this case, improperly endeavored to appeal by notice of appeal rather than petition for allowance of appeal under section 8 (c) of the Act of February 13, 1925, the Supreme Court was equally divided in

opinion as to whether the Circuit Court in that case, in the absence of an application for allowance of appeal, had the power to decide the case on the merits. By reason of the equal division of opinion among the members of the Supreme Court in the Nye case the action of the Circuit Court in taking jurisdiction of the appeal in that case was affirmed by the Supreme Court.<sup>2</sup>

In our view, in the absence of a petition for allowance of appeal and the granting of that petition by the District Court or the Circuit Court, this Court lacked jurisdiction to hear the defendant's appeal. Section 8 (c) of the Act of February 13, 1925, reads as follows:

62 "No appeal intended to bring any judgment or decree before a Circuit Court for review shall be allowed unless application therefor be duly made within three months after the entry of such judgment or decree."

Proper application for the allowance of an appeal under this section is mandatory, as appears both from the wording of the section itself and decisions of the Supreme Court. See *United States ex rel Coy v. United States*, 316 U. S. 342; *Wells v. United States*, No. 11, Original, October Term, 1942; *Steffler v. United States*, No. 14, Original, October Term, 1942. In *Alaska Packers Association v. Pillsbury*, 301 U. S. 174, involving an appeal from a decree in admiralty of the District Court, the Supreme Court held that a notice of appeal was not effective to give jurisdiction of the appeal to the Circuit Court where the appeal was governed by section 8 (c) of the Act of February 13, 1925, and that in the absence of a petition for allowance of appeal and the granting of such petition the Circuit Court had no jurisdiction to hear the appeal. Similarly, in *McCrone v. United States*, 307 U. S. 61, the Supreme Court held that a notice of appeal was not effective to give the Circuit Court jurisdiction of the appeal where the appeal was governed by section 8 (c) of the Act of February 13, 1925, and that the appeal in that case should have been prayed for and allowed as provided by that section.

The Circuit Court of Appeals for the Fourth Circuit and the Circuit Court of Appeals for the Eighth Circuit have likewise held that a notice of appeal is not effective to give the Circuit Court jurisdiction of an appeal governed by section 8 (c) of the Act of February 13, 1925. *Osborne v. United States*, 50 F. 63 (2d) 712 (C. C. A. 4th); *Share v. United States*, 50 F. (2d) 669 (C. C. A. 8th). Both of these decisions hold that in order for the Circuit Court to have jurisdiction of an appeal under

<sup>2</sup>It may be noted that the defendant in the Nye case was in a more favorable position on appeal than the defendant in the instant case for the reason that the Nye case removed any uncertainty as to the proper procedure for taking an appeal from a judgment for criminal contempt.

section 8 (c) of the Act of February 13, 1925, there must be a petition for allowance of appeal and a grant of the petition.

The requirement of the petition for allowance of the appeal and the grant of the petition being jurisdictional, the defect in the instant case was not cured by failure of Government counsel to raise the question of jurisdiction prior to this petition for rehearing. This jurisdictional defect cannot be cured by waiver or even by the consent of the parties. *Osborne v. United States*, supra.

### CONCLUSION

The appeal in this case should have been taken in accordance with the procedure of section 8 (c) of the Act of February 13, 1925. The defendant's failure to observe the requirements of that section was jurisdictional. Hence the Court should dismiss the defendant's appeal for lack of jurisdiction and should withdraw its opinion of May 24, 1943, in this case.

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*Assistant Attorney General.*

FREDERICK V. FOILMER,

*United States Attorney.*

64 In the United States Circuit Court of Appeals for  
the Third Circuit

No. 8265—October Term, 1942

UNITED STATES OF AMERICA

vs.

JASPER WHITE, APPELLANT

*Order denying petition for rehearing*

Filed June 18, 1943

And now, to wit, June 18, 1943, after due consideration, the petition for rehearing in the above-entitled case is hereby denied.  
Philadelphia.

JOHN BIGGS, JR.,

*Circuit Judge.*

65 [Clerk's certificate to foregoing transcript omitted in printing.]